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No. 79-1090

In the Supreme Court of the United States

OCTOBER TERM, 1979

PAY'N SAVE CORPORATION, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-32) is reported at 605 F. 2d 294. The order of the Federal Trade Commission (Pet. App. B-171 to B-177) and the Commission's opinion (Pet. App. B-123 to B-171) are reported at 90 F.T.C. 770, 858, 884.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 1979. A timely petition for rehearing was denied on October 16, 1979. The petition for a writ of certiorari was filed on January 12, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Commission properly found that petitioner violated Section 12 of the Federal Trade Commission Act, 15 U.S.C. 52, by falsely advertising a drug product using materials prepared by others.

2. Whether the Commission's order, as limited by the court of appeals, properly requires petitioner to make certain disclosures in its advertisements for weight-reduction preparations supplied by the company which was its co-respondent before the Commission.

STATEMENT

1. The facts and history underlying this case are set forth more fully in the government's brief in opposition in *Porter & Dietsch, Inc.* v. *FTC*, No. 79-731.[1] Briefly stated, petitioner is a large retail drug store chain that sells the X-11 weight reduction product marketed by Porter & Dietsch, Inc.[2] Over a period of years, petitioner advertised the X-11 product under its own name using materials prepared by Porter & Dietsch and its advertising agency. These materials were deceptive, false, and misleading in several respects. For example, the advertisements proclaimed that most users would lose a significant amount of weight, that weight would be lost without dieting, that the X-11 pills contained a unique ingredient, and that these claims were backed by scientific testing. In fact, however, none of these claims was true. In addition, the advertisements failed to disclose that the X-11 product poses a health risk to persons with high blood pressure, heart disease, diabetes, or thyroid disease (Pet. App. A-2 to A-3, A-10 to A-18).

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[1]A copy of our brief in opposition in No. 79-731 has been sent to petitioner.

[2]At the time of these proceedings, petitioner operated 140 stores (Pet. App. B-155).

After evidentiary hearings on an administrative complaint against petitioner, Porter & Dietsch, and others, the Commission concluded that petitioner's dissemination under its own name of X-11 advertising materials violated Section 12 of the Federal Trade Commission Act, 15 U.S.C. 52, even though petitioner did not prepare the advertisements and may have been unaware of their false and deceptive nature. The Commission held (Pet. App. B-152 to B-155) that Section 12 unequivocally declares that it is "unlawful * * * to disseminate, or cause to be disseminated, any false advertisement * * * for the purpose of inducing, or which is likely to induce * * * the purchase of food, drugs, devices or cosmetics" (15 U.S.C. 52), and that there is no exemption for retailers who disseminate advertising prepared by others. The Commission further observed (Pet. App. B-155) that imposing liability on petitioner was not unduly harsh, since if petitioner "had critically examined the advertising in light of the [X-11] package insert, it [w]ould have been obvious that the advertising at least did not coincide with the [X-11] plan."

The Commission accordingly ordered petitioner to cease and desist from its false advertising practices. In particular, petitioner was forbidden to claim that any product for weight reduction will bring about weight loss without dieting or will achieve certain results, unless such claims are substantiated by competent scientific evidence. Similarly, petitioner was prohibited from making unique ingredient claims or typical user testimonials unless such claims are true. The Commission also ordered petitioner to disclose in all future advertising for weight reduction products such as X-11 that dieting is required and that use may be dangerous to persons with certain health problems (Pet. App. B-172 to B-174).

2. The court of appeals affirmed the Commission's finding of petitioner's liability (Pet. App. A-28 to A-31). The court first rejected petitioner's claim that the proceedings before the Commission did not serve the public interest, noting that the Commission had not sought to vindicate private interests and that petitioner's activities were not de minimis (*id.* at A-29). Although indicating that petitioner should have known that the X-11 advertising was false, the court of appeals also agreed with the Commission that petitioner had in any event violated Section 12 of the FTC Act, because that statute "imposes a strict liability standard on disseminators of false [drug] advertising" (Pet. App. A-29). The court of appeals distinguished various cases involving advertising agencies relied on by petitioner, noting that "[i]n none of [these cases] was the court required to decide whether the agency was liable in the absence of knowledge" (*id.* at A-31).

The court of appeals concluded, however, that the Commission's order regarding petitioner's future advertising was too broad. The court explained that although an "advertiser's intent to deceive is not an element of the violation * * * [his] culpability has an important bearing * * * on the nature of the relief that should be granted" (Pet. App. A-31). Accordingly, the court of appeals narrowed the Commission's order to apply only to petitioner's advertising of Porter & Dietsch products (*id.* at A-32). As to such products, petitioner is required to ascertain that product performance claims are substantiated by competent scientific tests and that testimonials and unique ingredient claims are true. In addition, petitioner may not advertise X-11 or similar Porter & Dietsch products, unless the advertisement discloses that dieting is required and that the product poses a health risk to certain users.

ARGUMENT

1. Petitioner contends (Pet. 11-20) that the court of appeals erroneously concluded that a drug advertiser who disseminates a false advertisement violates Section 12 of the Federal Trade Commission Act, 15 U.S.C. 52, even though the advertiser did not actually know that the advertisement was false.[3] But Section 12 broadly and unambiguously states that "[i]t shall be unlawful for any * * * corporation to disseminate, or cause to be disseminated, any false advertisement * * * " regarding food, drugs, devices, or cosmetics. Nothing in that sweeping language suggests that an advertiser violates Section 12 only if he knows that the advertisement is in fact false. As the court of appeals concluded (Pet. App. A-29 to A-31), knowledge of falsity or an intent to deceive is simply not an element of a Section 12 violation. Accord, *Chrysler Corp.* v. *FTC*, 561 F. 2d 357, 363 n.5 (D.C. Cir. 1977); *Doherty, Clifford, Steers & Shenfield, Inc.* v. *FTC*, 392 F. 2d 921, 925 (6th Cir. 1968); *Montgomery Ward & Co.* v. *FTC*, 379 F. 2d 666, 670 (7th Cir. 1967); *Mueller* v. *United States*, 262 F. 2d 443, 446 (5th Cir. 1958); *Koch* v. *FTC*, 206 F. 2d 311, 317 (6th Cir. 1953); *L. & C. Mayers Co.* v. *FTC*, 97 F. 2d 365, 367 (2d Cir. 1938). See also *FTC* v. *Algoma Lumber Co.*, 291 U.S. 67, 81 (1934).

The conclusion that Section 12 prohibits all false advertising of drugs regardless of the advertiser's intent or knowledge is corroborated by Section 14 of the Act, which was enacted simultaneously with Section 12. Section 14(a) imposes criminal liability on any person who disseminates a false advertisement "with intent to

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[3]Of course, in this case, both the Commission and the court of appeals found that petitioner should have known that the advertisement was false in at least some respects, since the advertising claims were inconsistent with the written materials accompanying the X-11 product (Pet. App. A-29, B-155).

defraud or mislead." 15 U.S.C. 54(a). No such language appears in Section 12, which is merely a broad civil prohibition against false advertising. Moreover, Section 14(b) exempts publishers, broadcasters, advertising agencies, and the like from criminal liability. Congress specified, however, that this exemption does not apply to "the manufacturer, packer, distributor, *or seller* of the commodity to which the false advertisement relates * * *." 15 U.S.C. 54(b) (emphasis supplied). A fortiori, Congress did not intend to except retailers, such as petitioner, from the scope of Section 12.[4]

Relying on *Standard Oil Co. of California* v. *FTC*, 577 F. 2d 653 (9th Cir. 1978); *Doherty, Clifford, Steers & Shenfield, Inc.* v. *FTC*, *supra*; and *Carter Products, Inc.* v. *FTC*, 323 F. 2d 523 (5th Cir. 1963), petitioner asserts (Pet. 12-16) that there is a conflict among the courts of appeals regarding the proper construction of Section 12.[5] But in none of those cases did the court of appeals address the issue of an advertiser's liability under Section 12. Rather, in each case liability of an advertising agency turned on whether the agency had participated in the commission of an unfair or deceptive trade practice, in

[4]Without citing any legislative report, debate or hearing, petitioner claims (Pet. 18-20) that the legislative history of the Act does not support a literal reading of Section 12. During oral argument before the Commission, however, counsel for petitioner conceded that "nothing in the legislative history of Section 12 supports * * * an exception [for retailers who disseminate advertisements prepared by others]" (Pet. App. B-155). Furthermore, the Commission's discussion of the legislative history of Section 12 (Pet. App. B-153 to B-155) shows that Congress considered various exemptions to Sections 12 and 14, but purposefully declined to create any exemptions to the broad coverage of Section 12.

[5]Elsewhere, however, petitioner argues (Pet. 16) that this is a case of first impression.

violation of Section 5 of the Act, 15 U.S.C. 45.[6] To be sure, in each of those cases the court of appeals indicated in dictum that a cease and desist order should not issue against an advertising agency for the false advertisements of an advertiser, unless the agency knew or had reason to know of the falsity.[7] But, as the court of appeals in both this case and *Doherty* expressly recognized, the question whether an advertiser has disseminated false or deceptive advertising—an issue as to which the advertiser's good faith and knowledge is irrelevant—is analytically distinct from the question whether and what kind of cease and desist order is appropriate—an issue as to which good faith and knowledge of falsity are relevant. See Pet. App. A-31; compare 392 F. 2d at 925 with *id.* at 928. See also 15 U.S.C. 54(b).[8]

[6]*Standard Oil* and *Carter Products* involved only Section 5. See 577 F. 2d at 655; 323 F. 2d at 526. Although the Commission's proceedings in *Doherty* were also based on Section 12 (see 392 F. 2d at 923), the court of appeals relied exclusively on the Section 5 analysis in the *Carter Products* decision and did not discuss, much less construe, Section 12.

[7]See 577 F. 2d at 659; 392 F. 2d at 928; 323 F. 2d at 534. As the court of appeals pointed out (Pet. App. A-31), in *Standard Oil*, *Doherty*, and *Carter Products*, "the advertising agency knew of the falsity, and the court sustained liability. In none of them was the court required to decide whether the agency was liable in the absence of knowledge." Here, the Commission and the court of appeals found that petitioner should have known that the X-11 advertisements were flatly inconsistent with the X-11 instructions. See note 3, *supra*.

[8]Amici Curiae Washington Retail Council, American Retail Federation, and National Ass'n of Chain Drug Stores erroneously suggest (Br. 11-12) that the decision of the court below will result in substantial penalties under Section 5(m) of the Act, 15 U.S.C. 45(m), for Porter & Dietsch's other cooperative advertisers even if they have "acted with reasonable prudence and innocence." Section 5(m) imposes liability on persons who are not a party to a cease and desist order only if they acted "with actual knowledge that such act or practice is unfair or deceptive and is unlawful under subsection (a)(1) of this section." 15 U.S.C. 45(m)(1)(B)(2).

2. Petitioner's further contentions (Pet. 20-23) regarding the First Amendment implications of the Commission's order (as modified by the court of appeals) are fully addressed in the Commission's Brief in Opposition in *Porter & Dietsch, Inc.* v. *FTC*, No. 79-731. As we explained there, the First Amendment affords no protection to deceptive, misleading, or false commercial speech. See also *Village of Schaumburg* v. *Citizens for a Better Environment*, No. 78-1335 (Feb. 20, 1980), slip op. 12 n.7, 14, 17 n.11.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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